

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 22 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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|------------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2009-0269-PR |
| |) | DEPARTMENT B |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| JOHN WHITT MULHOLLAND, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-38313

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF GRANTED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

John Mulholland

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement entered in May 1993, petitioner John Mulholland was convicted of attempted sexual conduct with a minor under the age of fourteen and attempted molestation of a child under the age of fourteen. He previously sought post-conviction relief. *See State v. Mulholland*, No. 2 CA-CR 2008-0179-PR (memorandum decision filed Nov. 14, 2008); *State v. Mulholland*, No. 2 CA-CR 99-0427-PR (memorandum decision filed Jan. 27, 2000); *State v. Mulholland*, No. 2 CA-CR 94-0425-PR (memorandum decision filed Dec. 22, 1994). In this petition for review, he challenges the trial court's order summarily dismissing his petition for post-conviction relief in which he contended he should be released at this time. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Mulholland's claim in the trial court, as it is on review, was that he should have been released by now, based on his calculation of earned release credits. He contended the Arizona Department of Corrections (ADOC) has miscalculated his credits. The court agreed with the state, however, that it did not have jurisdiction to address the issue, relying on *State v. Wagstaff*, 164 Ariz. 485, 794 P.2d 118 (1990). But if Mulholland is correct, the claim is cognizable under Rule 32.1(d), Ariz. R. Crim. P. *See id.* cmt. (subsection intended to include miscalculation of release credits "which result in the defendant's remaining in custody when he should be free"). Mulholland was sentenced to two, consecutive, ten-year prison terms and was eligible for possible release after serving a portion of these sentences.

¶3 We note that among Mulholland's arguments is his claim that ADOC erred in applying release credits to the first of his consecutive sentences. Although he has not established he had the right to have credits apply to the first of the consecutive ten-year terms, *see* A.R.S. § 41-1604.06; *Crumrine v. Stewart*, 200 Ariz. 186, ¶¶ 7-8, 24 P.3d 1281, 1283 (App. 2001), he nevertheless has asserted a cognizable claim for relief. Therefore, the trial court abused its discretion in concluding it lacked jurisdiction to address his claim. *See State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004) (trial court abuses discretion when it commits error of law). We grant the petition for review and remand this matter for further proceedings consistent with this decision.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge